



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 9, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-1623

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 116568.

The Texas Department of Health (the "department") received a request for records on Horizon Specialty Hospital-Corpus Christi (the "hospital"). You state that you have released some of these records to the requestor. You contend that the remaining responsive records are excepted from disclosure under section 552.101 of the Government Code in conjunction with various state statutes and federal regulations. We have considered the exception you claim and have reviewed the documents at issue.

You note that the department did not seek an open records decision from this office within the statutory ten-day deadline. *See* Gov't Code § 552.301. The department's delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The applicability of section 552.101 generally constitutes a compelling reason.<sup>1</sup>

The submitted documents include a report about the hospital's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no

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<sup>1</sup>A claim under the informer's privilege may be waived by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 (1990) at 6. We conclude that the informer's privilege is not a compelling exception in this instance and, therefore, may not be used to withhold any of the requested information from required public disclosure under section 552.101.

information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. It appears that the hospital has had a reasonable opportunity to review and comment on the report. We have marked some identifying information that must not be released. In accordance with federal law, the department must release the remaining portions of the HCFA form 2567.

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* In this case, common-law privacy protects from disclosure information that identifies several individuals who were treated at the hospital. We have marked the information that the department must withhold under section 552.101 in conjunction with the common-law right to privacy.

You raise section 48.101 of the Human Resources Code, which governs the disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

Some of the submitted documents, which we have marked, are confidential pursuant to section 48.101(a) of the Human Resources Code. *See* Hum. Res. Code § 48.082(a); *see also id.* § 48.002 (definitions). These documents must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); 25 T.A.C. § 1.207; *but see* Hum. Res. Code § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). You note that one "Report of Contact" contains information that is similar to information contained in the abuse and neglect reports. You do not indicate, nor does it appear, that the "Report of Contact" was "used or developed in an investigation" made under Chapter 48 of the Human Resources Code. Therefore, we find that section 48.101(a) is not applicable to the "Report of Contact." We have, however, addressed the other exceptions you raised for the "Report of Contact."

Finally, the submitted documents include medical records and information obtained from medical records. The Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, section 5.08(b) provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, §§ 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We have marked the documents to indicate which information is subject to the MPA. The department may only release this information in accordance with the MPA. Open Records Decision Nos. 598 (1991), 546 (1990); *see* V.T.C.S. art. 4495b, §§ 5.08 (c), (j), (k).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Karen Hattaway". The signature is fluid and cursive, with the first name "Karen" and last name "Hattaway" clearly distinguishable.

Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/mjc

Ref: ID# 116568

Enclosures: Marked documents

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(w/o enclosures)